

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TAMIKA HICKMAN)	
Claimant)	
V.)	
)	Docket No. 1,075,418
MEDICALODGES, INC.)	
Respondent)	
AND)	
)	
TRANSPORTATION INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the July 7, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden.

APPEARANCES

Mark J. Hoffmeister, of Overland Park, Kansas, appeared for the claimant. Bret C. Owen, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from July 6, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant met her burden of proving she met with personal injuries to both upper extremities from repetitive trauma arising out of and in the course of her employment with respondent. The ALJ went on to deny claimant's request for benefits finding claimant failed to meet her burden that she provided proper notice to respondent.

Claimant appeals, arguing the Board should reverse the ALJ's Order because she provided respondent with proper notice of the compensable work injury.

Respondent argues the ALJ's Order should be affirmed in that claimant did not provide proper notice, but reversed in that claimant did not sustain personal injury from repetitive trauma arising out of and in the course of her employment and that her work activities were not the prevailing factor causing her injuries and medical condition.

The issues on appeal are:

1. Did claimant provide respondent with proper notice of her injuries?
2. Did claimant sustain personal injury by a series of trauma arising out of and in the course of her employment with respondent, specifically were such work activities the prevailing factor causing the alleged injuries, medical condition and need for medical treatment?

FINDINGS OF FACT

Claimant was working for respondent from October 2012 to April 2015 as a CNA/CMA. Claimant alleges she met with personal injury by repetitive trauma each and every working day through April 21, 2015, her last day worked for respondent. The parties have agreed, for preliminary hearing purposes, that the legally operative date of repetitive trauma herein is April 21, 2015.

The current claim involves claimant's bilateral upper extremities, in particular her wrists and elbows. Claimant had another claim with respondent in 2013 and a claim with a date of accident of April 5, 2015, neither of which was disputed and involved her back and neck.

Claimant indicated that during a period of restricted duty with her back and neck claim, she was doing very different tasks involving writing and filing. Two or three months into performing this light duty work, claimant started to develop pain and discomfort in her wrists and hands. Claimant believes actively writing and grabbing stacks of papers and filing them in cabinets caused the symptoms in her hands and wrists. Claimant also testified that when she worked with patients, having to lift their legs or having to push them down the hallway in a wheelchair or transfer them with a lift, caused her to have pain in her wrists and hands. Also, popping medications out of bubble packs caused pain in her wrists. Claimant dispensed medications three times a day to 20 to 30 patients.

Claimant first thought her wrist and hand pain came from sleeping on her hands wrong. She reported to Jessica Lettelier, the staffing coordinator and an LPN, that her hand was hurting and she needed a break. This was after being asked why she was not performing her light work duty. Claimant testified she reported her pain to Ms. Lettelier on several occasions. There was no offer of treatment. Claimant's testimony does not make it clear whether she informed Ms. Lettelier as to the work-related nature of her alleged hand pain.

Claimant eventually went to work for Brookdale and then Hoeger House. Claimant testified the differences in her jobs at Brookdale and Hoeger House from respondent were that they are not a nursing home, there were fewer patients, it was not as hands on as her work at respondent and there is help assisting patients. She also is not doing the same type of lifting as before. She testified she brings the medications and therapy assists the patients with their bathing and dressing. She also does not have to pop out medications from packaging nor write her entire shift like she did at respondent.

Claimant met with William Raue, D.O., at U.S. HealthWorks Medical Group, on three occasions, April 7, 2015, April 9, 2015, and May 7, 2015, for complaints of pain in her neck and back. Claimant related her pain to her work with respondent and was sent to physical therapy. Ultimately, Dr. Raue concluded claimant's symptoms were preexisting and referred her to her primary care physician. There was no mention of upper extremity difficulties. The office report of April 7, 2015, indicated claimant's upper extremity sensation was normal. On April 9, 2015, the office report noted no pain radiation. Claimant missed the April 16, 2015, scheduled examination without reason. But the May 7, 2015, office report indicated her upper extremity examination was again normal, with no upper extremity complaints noted.

Claimant testified that when she was seen at U.S. HealthWorks Medical Group, she reported the numbness and tingling in her hands every time because she had to fill out a form where all the areas with pain are marked. These alleged forms are not contained in the exhibits to the preliminary hearing. Claimant testified her hands and wrists were not examined, but she was given a brace for her left wrist. Claimant indicated she did not discuss her work history at Brookdale with the doctor. She also indicated the doctor did not ask about her work at Hoeger House. Claimant confirmed her hand and wrist symptoms first developed during her employment with respondent.

Claimant met with Michael J. Poppa, D.O., on July 14, 2015, for an examination at the request of her attorney for mid and upper back, and neck pain stemming from the April 5, 2015, accident. At that time claimant reported her hands were falling asleep. Claimant reported a history of left wrist, low back and right knee injuries in 2013. Dr. Poppa examined claimant and opined the work injury claimant sustained on April 5, 2015, was the prevailing factor in the need for medical treatment of the cervical spine, thoracic spine and chronic myofascial pain.

During his examination of claimant, Dr. Poppa found evidence of bilateral overuse cumulative trauma, bilateral elbow median nerve impingement and bilateral median nerve impingement at each wrist manifested as bilateral elbow cubital tunnel syndrome and carpal tunnel syndrome, relative to claimant's work duties with respondent. He opined claimant's employment with respondent was the prevailing factor in causing claimant's bilateral upper extremity overuse cumulative trauma.

In an October 16, 2015, report Dr. Poppa opined the diagnosis of bilateral upper extremity overuse was the prevailing factor in causing claimant's repetitive medical conditions as well as expected medical treatment and disability. Dr. Poppa's reports are somewhat confusing as it is not always clear whether he is referring to the April 5, 2015, accident or the upper extremity overuse cumulative trauma.

Claimant met with James S. Zarr, M.D., on November 18, 2015, for an examination of her neck, back, bilateral elbow, wrist and hand pain at respondent's request. He noted these problems began on April 5, 2015. His report indicated claimant filed her claim for bilateral elbow, wrist and hand pain on April 28, 2015, after she no longer worked for respondent. Claimant then went to see Dr. Poppa in July 2015, who determined her upper extremities problems were not related to her work injury for the neck and back. Dr. Zarr diagnosed persistent neck and upper back pain; bilateral elbow, wrist and hand pain; and previous low back pain secondary to a previous work-related injury. Dr. Zarr stated in his November 18, 2015, report, that he agreed with Dr. Poppa, although inaccurately, that claimant's bilateral elbow, wrist and hand pain is not related to claimant's work activities at respondent.

Claimant met with Terrence Pratt, M.D., for a court-ordered Independent Medical Examination (IME) on February 23, 2016. Dr. Pratt noted that claimant reported numbness in both hands since February 2013, which essentially resolved in May 2013. During the examination, Dr. Pratt noted a positive Tinel's bilaterally at the wrist and a positive Phalen's bilaterally. Claimant related her current bilateral upper extremity numbness to work-related activities during her employment with respondent from 2013 to April 2015. Dr. Pratt indicated claimant did not report her upper extremity symptoms and their relation to her work until 2015. Dr. Pratt noted the absence of radiographic studies for his consideration.

In attempting to determine causation, Dr. Pratt discussed a multitude of factors, including the delayed reporting of symptoms; the conflict between claimant's allegations of symptoms and the medical reports of U.S. HealthWorks, the lack of upper extremity symptoms in 2013, the fact claimant is female and obese and the lack of aggravating work duties after claimant left respondent. Dr. Pratt also noted claimant did not report the "involvement" until after she discontinued her activities for respondent. Dr. Pratt's causation opinion is less than clear. He states in the report "the main potential causes that I am aware is her reported vocationally related activities."¹

In a followup report dated April 29, 2016, Dr. Pratt discussed the provided electrodiagnostic testing performed on claimant to confirm potential peripheral nerve entrapment. The studies confirmed claimant had bilateral carpal tunnel syndrome. This report contains no opinion regarding causation.

¹ Pratt IME Report (Feb. 2, 2016) at 4.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(e)(f)(1)(2)(A) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ determined that claimant proved, by the barest of margins, her work for respondent was the primary factor, compared to all the other factors noted in this record, causing her bilateral carpal tunnel syndrome. The ALJ noted Dr. Poppa's opinion claimant's work for respondent was the prevailing factor, although without explanation. Dr. Zarr found the opposite, also without further explanation. It was only Dr. Pratt whom the ALJ determined, provided a convincing causation argument. But, even Dr. Pratt's opinion is suspect in this instance.

The ALJ determined claimant had satisfied her burden regarding the prevailing factor for her upper extremity trauma. The ALJ had the opportunity to observe claimant testify. The Board has generally given deference to an ALJ's ability to assess the credibility of a witness who testifies before that ALJ. In this instance, this Board Member, while questioning the legitimacy of claimant's allegations, finds claimant has proven she suffered injury by a series of repetitive trauma while working for respondent, with the agreed date of accident of April 21, 2015. The Order of the ALJ is affirmed on this issue.

K.S.A. 2014 Supp 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Notice is required within ten calendar days of an employee's last day of actual work for an employer. Here, claimant's last day of work was the agreed date of repetitive trauma, April 21, 2015. Thus, the last day for claimant to provide timely notice would be May 1, 2015, as noted in the Order.

Claimant attempts to support timely notice with testimony regarding conversations she alleges occurred with Jessica Lettelier, respondent's staffing coordinator. A simple conversation regarding ongoing pain is not sufficient to satisfy the notice statute. Specifics must be provided indicating the time, date, place and particulars of the injury. Here, claimant only testified to comments regarding hand pain, with no specifics connecting the pain to her work for respondent. Those alleged conversations do not satisfy the requirements of the notice statute. Claimant also acknowledged failing to notify respondent of the work-related nature of her injuries until after her appointment with Dr. Poppa on July 14, 2015. This date also fails to satisfy the requirements of K.S.A. 2014 Supp. 44-520. The denial of benefits due to claimant's failure to provide timely notice of her alleged repetitive trauma is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

² K.S.A. 2015 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant failed to provide respondent with timely notice of her repetitive trauma injuries.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge William G. Belden dated July 7, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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William G. Belden, Administrative Law Judge